

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:)	
)	
GRACENOTE, INC.,)	
)	
Plaintiff,)	
)	
v.)	Case No. 2:16-CV-950CW
)	
SORENSEN MEDIA, INC.,)	
)	
Defendant.)	

Transcript of Motion Hearing to

BEFORE THE HONORABLE CLARK WADDOUPS

May 11, 2017

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1 **Salt Lake City, Utah, Thursday, May 11, 2017**

2 * * *

3 THE COURT: We are here in the matter of
4 Gracenote v. Sorenson Media, case 2:16-cv-950. Will
5 counsel please state their appearance.

6 MR. STRAIGHT: Your Honor, good afternoon,
7 Sam Straight and Steven Yovits. Steven's from Kelly
8 Drye, and he'll make the argument today on behalf of the
9 plaintiff Gracenote.

10 THE COURT: Thank you.

11 MR. LORIMER: Brent Lorimer of Workman
12 Nydegger, and my colleague Michal Huget of Honigman,
13 Miller, Schwartz and Cohn on behalf of Sorenson.

14 THE COURT: Thank you. Just an explanation,
15 I've not joined a new gang, but I had some minor surgery
16 that requires me to wear a bandage. Hopefully the
17 damage is only skin deep so I'll be able to understand
18 your arguments.

19 Let's begin with the defendant's argument.
20 I've read the pleadings, I've read the patent, and I
21 have read most of principal cases.

22 MR. HUGET: Thank you, Your Honor. I
23 appreciate the opportunity to be here today, and I will
24 be brief. I know the court's aware of this matter
25 generally and I appreciate Your Honor's work on this

1 matter.

2 We're here, Your Honor, because Sorenson is
3 seeking dismissal of the plaintiff's complaint because
4 it does not -- it lacks the factual content to put
5 Sorenson on fair notice of the nature of plaintiff's
6 infringement claims.

7 More particularly, Your Honor, the
8 fundamental problem we have with this complaint is this:
9 It lacks the sufficient detail for us to understand
10 which claims are being asserted against which products.
11 While there are some patent claims that are identified,
12 they are not tied to a particular Sorenson product.
13 There is simply no definition in this complaint of what
14 the infringing product is. Presently it's ambiguous and
15 it potentially implicates numerous products and
16 platforms that we do not believe should be an issue in
17 this case. When we look at the complaint it appears
18 like it may be narrower. There are parts of this
19 complaint, for example, in paragraph 19 has a summary of
20 what it seems they are alleging. And they say, and I'll
21 quote briefly, Upon information and belief, the
22 infringing product is capable of performing a variety of
23 functions, including content fingerprinting, to analyze
24 and take action, such as enabling targeted
25 advertisements, based on the content displayed to a

1 viewer.

2 So just a real world example, you're sitting
3 at your smart TV, you're sitting there watching a
4 football game or a basketball game, and they know --
5 there's enough information about you demographically,
6 that sort of thing, so that you're getting ads
7 appropriately targeted to you and not children's toy ads
8 or something like that, unless, of course, you're a
9 parent and it's around Christmastime or some other sort
10 of holiday. That's one product that Sorenson offers.
11 It's an ad content replacement type product.

12 The problem is we have a number of other
13 products. It's very clear from the information that
14 even the plaintiff has cited and tried to conflate a lot
15 of these products. We have, for example, an Analytic
16 Suite product. What is that? You run a TV station and
17 you have -- you use the Analytic Suite product. This
18 has fingerprinting, content fingerprinting to some
19 extent, as called for in the paragraph 19 in some of
20 these claims, but it doesn't do anything that targets
21 advertising to you, direct to you. So it appears to
22 fall outside of what they're claiming, but I don't know
23 with particularity because they haven't tied any of
24 these claims to any particular products, and that's the
25 fundamental problem that we have here. And it's a real

1 practical problem, given that we talked -- we had that
2 conversation in the hearing with you on the motion to
3 stay back, I believe, in November and we talked about
4 this a little bit.

5 But the real world problem we have with this
6 is what's the burden that we face as the defendant in
7 gathering the information we need to produce -- do I
8 have to produce Analytic Suite type information, that
9 platform, those type of documents and the other products
10 that I may -- that may be implicated and may not be.
11 That's why it's important for us to get a little more
12 particularity, it's important for the plaintiff to have
13 to tie the factual allegations of the accused products
14 to these claims with more particularity than has been
15 done now.

16 We cited a number of cases. I won't go
17 through the cases, Your Honor, I know you've read them,
18 but the cases -- one in particular I thought was
19 appropriate was the *Apollo* case that we cite in our
20 reply brief, and I think it takes head-on this argument
21 that they say that they don't really have to identify
22 the infringing product. The court there dismissed a
23 complaint because it said, a complaint that simply
24 identifies the allegedly infringing product, products,
25 excuse me, and parrots the language of a directed patent

1 infringement claim by alleging that the defendant
2 produces, uses, sells, and offers for sale the
3 identified product without explaining how, if at all,
4 defendant may be infringing without factual support
5 cannot survive. That is precisely what we have here.
6 We just simply have allegations, we have on information
7 and belief that they may infringe, and that's it, that's
8 as far as it goes. So we really need more information.

9 And I want to address briefly, my last point
10 is because they made a -- I think they rely extensively
11 on this claim chart that they've attached to their
12 response. It's not a claim chart. A claim chart will
13 point with particularity to the accused product or
14 device or method. What they did here is just simply cut
15 and paste the patent claims and compared them to what's
16 in the complaint. That doesn't do anything for us.
17 That is simply -- it makes no effort because the
18 complaint makes no effort to relate any factual
19 assertions regarding the functioning of this product to
20 claims. So the claim chart really is not a claim chart,
21 Your Honor.

22 So for those reasons and the reasons we've
23 put in our brief, unless the court has any questions,
24 those are the points that I wanted to stress today. I'm
25 happy to respond briefly, if appropriate, after

1 plaintiff's argument.

2 THE COURT: I may have some questions, but
3 let's hear from the plaintiff's counsel.

4 MR. HUGET: Thank you.

5 MR. YOVITS: Good afternoon Your Honor. Let
6 me just plug in my cable here.

7 Your Honor, I have some slides and I'll go
8 over them on the computer, but I also have hard copies.
9 May I approach. I have two, if you would like.

10 THE COURT: Yes, please. Give one to my
11 clerk as well.

12 MR. YOVITS: Your Honor, here's a quick
13 summary of what I would like to go over. It looks like
14 an awful lot, but it goes very quickly. I think it will
15 give the background that we need to understand
16 Gracernote's complaint. I would like to take a quick
17 look at Form 18. I know we all agree it doesn't apply,
18 but I think for context, spending 20 seconds on it might
19 be useful. Then also a very quick look at what the
20 requirements are for a complaint. I know that the court
21 is well aware of the standards, and I don't intend to
22 spend much time on it. But then I would like to give a
23 little explanation of what Gracernote's patents cover,
24 the accused SPARK product, and then tie it together by
25 showing how Gracernote's complaint reads the patents on

1 the product. Again, it looks like a lot, but it will go
2 very, very quickly.

3 Form 18, as I said, everybody agrees that
4 this does not apply, but it's worth seeing that Form 18
5 really required almost nothing, a statement of
6 jurisdiction, a statement of patent ownership, a
7 statement that their patents are infringed by making,
8 using, or selling a device, and a statement that the
9 notice requirement has been met. I don't think there's
10 any dispute in this case that Gracenote's complaint
11 contains much more than this. In particular, there's an
12 element-by-element analysis and some explanation as to
13 how the claim elements are met.

14 So without Form 18 the question becomes
15 what's required. And I think the answer is that there
16 are no hard and fast requirements. That's -- it's up to
17 the court's discretion. It's going to be case specific.
18 *Iqbal* tells us determining whether a complaint states a
19 plausible claim for relief will be a context-specific
20 task that requires the court to draw on its judicial
21 experience and common sense.

22 I think the one underlying function of a
23 complaint that all the cases seem to agree on is the
24 notice function. The primary function of the complaint
25 is to put defendants on notice as to what they must

1 defend. I've taken this quote from a Delaware case, but
2 we can find it in Federal Circuit cases, as well as
3 *Iqbal* and *Twombly*. As I said, there are no hard -- seem
4 to be no hard and fast rules. Some courts have dealt
5 with what might be required in a patent case, some are
6 more stringent than others. This *Niazi* case that's very
7 recent from Wisconsin talks about in patent cases just
8 identifying the claims asserted and the devices accused
9 will be enough to do the job.

10 Let's take a quick look at Gracenote's
11 patents. Gracenote's patents cover the insertion of
12 advertising and content into a video stream
13 automatically. And it does that with these two
14 concepts, the main data stream and the reference data
15 stream. The main data stream is what a broadcaster
16 sends out over the air, over the cable. It's what you
17 would expect, it's what's intended for the viewer, the
18 commercials and the programming. Whereas, the reference
19 data stream is less than that. It's just the
20 programming. And what you can do with the reference
21 stream is locate a particular point in the main data
22 stream where you want to insert content, and that will
23 be clear in a second. I just note again, before leaving
24 this slide, that the reference data stream contains less
25 information. It's only the programming and that enables

1 it to be transmitted at a slower data rate.

2 So what happens in Gracenote's patents is
3 that the data streams are fingerprinted. And what that
4 means is little snapshots are taken of each video scene.
5 What that does is it allows for comparison between the
6 reference stream and the main data stream and allows
7 automatic content recognition. In other words, it
8 automatically locates a place in the main data stream
9 where you want to insert some content.

10 So, for example, this is the movie *North by*
11 *Northwest*, you might recognize. There are fingerprints
12 here of each -- a picture of each of these scenes, and
13 if you've decided that you would like to insert maybe an
14 advertisement after the point where Cary Grant falls to
15 the ground, you would take that fingerprint in your
16 reference stream and begin to compare it to the
17 fingerprints of the main content stream, and when you
18 find a match then you automatically locate it where you
19 want to insert your content.

20 Now, let me briefly talk about the accused
21 SPARK product. And what we've named -- excuse me, what
22 we've named in the complaint is the SPARK product, and
23 Mr. Huget has argued that that's not really a product,
24 or that it's an overall brand name. But what we can see
25 from the Sorenson Website, here's the home page, that

1 the company really has these two products, SPARK and
2 SQUEEZE. Those are highlighted in yellow.

3 This boxed portion is also from the Sorenson
4 Website, and this portion talks about the overall SPARK
5 product. And sometimes the Website variously refers to
6 it as either SPARK or SPARK Solutions. Those seem to be
7 the same thing. We've called it SPARK in the complaint.
8 On the right side here of this part of the Web page it's
9 called SPARK, on the left SPARK Solutions. And in each
10 case they talk about how the various technologies, the
11 various suites that are the components of SPARK work
12 together to form this product. And we find it several
13 times over and over again on the Sorenson Website.
14 There's the SPARK product here surrounded by its
15 component parts, the Analytics, Content, Ad and Video
16 Suites. And again and again here we see a statement
17 that SPARK Solutions combine multiple elements of the
18 SPARK Analytics, Content, Ad and Video Suites to create
19 the end-user experience.

20 Now, the advertising and content placement
21 functionality of SPARK that Gracenote accuses is part of
22 the overall SPARK product. It doesn't simply fit neatly
23 into one of the suites that Sorenson wants us to choose.
24 And the problem is if we have to choose one of the
25 suites, we're going to be denied the discovery that we

1 need to prove our case. For example, we may want to --
2 we may have to choose the Ad Suite. And then if we need
3 to get discovery on fingerprinting or how you match up
4 the scenes and the reference to the main data stream,
5 we'll be told, well, no, that's the Analytics Suite, you
6 can't have discovery on that because you named the Ad
7 Suite.

8 How do we know that the advertising content
9 placement is part of the overall SPARK product and not
10 part of one of the suites? Well, we know it from the
11 Website, but we also know it from the presentation that
12 Sorenson came and gave to Tribune Media, which used to
13 be Gracenote's parent company. This is some excerpts of
14 it. Here's the cover page. And this presentation
15 discusses each of the suites individually. So here,
16 first, there's a title page for the Analytics Suite, and
17 it goes on to talk about what that is. You can see
18 there's a diagram in here. I don't want to read the
19 whole thing, but you can see on the left-hand side in
20 the dotted box it talks about fingerprinting and tagging
21 and harvesting that's done by the Analytics Suite.

22 The next section is the SPARK Content Suite.
23 Here's the title page for that. There's a diagram that
24 shows the Content Suite is what pushes the content to
25 the user's television. There's some more discussion.

1 Then finally there's a section on SPARK
2 Solutions, and here's the title page for that. Again
3 there's a diagram.

4 And then there's this inserted page that
5 just says Adjustable Advertising Section. There isn't
6 any more than that, just this, but this does show
7 clearly that Sorenson considers this to fall within the
8 overall SPARK product.

9 So with all that said now, finally coming to
10 Gracenote's complaint, the complaint doesn't contain
11 claim charts. It does contain the information needed to
12 generate the claim charts, which is what's important to
13 serve the notice function. There's no particular magic
14 to have it in claim chart form.

15 So I want to address here what Mr. Huget was
16 talking about, the claim chart that we put in the
17 briefs. Again, this is not in the complaint. I simply
18 put this together to show how easily it can be done from
19 the text in the complaint, and that all the information
20 that's needed to put the defendant on notice is there.
21 So on the left I've set forth the claim elements. On
22 the right I've set forth the language from the
23 complaint. And I've even color-coded a little bit, so
24 where you see on the left you see red, the right -- the
25 right side has red showing where the complaint makes an

1 explanation of how that element is infringed.

2 So very quickly I'll go through this. This
3 is for Claim 1 of the '718 patent, an apparatus
4 comprising of processor configured by a comparator unit
5 to receive a main data stream and a reference data
6 stream. Here's a point where the complaint -- I'm just
7 parroting the claim language because these things are
8 going to be explained later. We just say SPARK operates
9 by receiving both the main data stream and a reference
10 data stream. We're going to explain that immediately
11 below.

12 The next element is that the main data
13 stream includes main content elements intermixed with
14 inserted content elements. And on the right side we
15 give the claim language, enough claim language to make
16 it evident which element to the claim is being referred
17 to, but also add enough to give some explanation. So
18 here we say the main data stream includes a plurality of
19 main content elements, and that's the program content,
20 intermixed with inserted content elements, e.g.,
21 advertisements. So here what we've done is we've
22 explained how the main content element appears in the
23 SPARK product, it's the program content. How the
24 inserted content elements appear in the accused product,
25 it's the advertisements.

1 And we go on similarly, the reference data
2 stream having a different data rate than the main data
3 stream. And we explain on the right that the reference
4 data stream has less data than the main data stream.
5 And that's the explanation for how it has a different
6 data rate.

7 The next element is including reference
8 fingerprints to the main content elements of the main
9 data stream, on the right the explanation. The
10 reference data stream includes reference fingerprints
11 and time stamps, i.e., elements of markup information of
12 the main content elements of the main data stream,
13 thereby explaining that the reference data stream is the
14 main content element.

15 The next element, there's not much more to
16 explain. These are terms that have already been dealt
17 with. Compute means fingerprints from at least some of
18 the main content elements included in the main data
19 stream. Our complaint simply has that language.

20 And then, finally, the last element, a
21 control unit configured to select the main content
22 elements from the main data stream based on a comparison
23 of the main fingerprints to the reference fingerprints.
24 On the right we explain that selection process. SPARK
25 then identifies a main fingerprint that corresponds or

1 links with a reference fingerprint. The infringing
2 product selects a displayed main content element based
3 on reference fingerprints.

4 What I would like to do now before leaving
5 this slide is to just point out on the right side we can
6 see the various suites that are implicated in this one
7 product or this one functionality. That is, if we look
8 at the red, the program content, well that's the Content
9 Suite, and probably also the Video Suite. We have the
10 advertisements, that's the Ad Suite. We have, as you go
11 on, the fingerprinting, the comparing of the
12 fingerprints to do the automatic content recognition,
13 and that's the Analytics Suite. We can't simply pick
14 one of the component technologies to accuse.

15 So, you know, the upshot of Sorenson's
16 argument is that they're unable to tell whether it's the
17 Analytics Suite or the Content Suite or the Ad Suite,
18 but as we've seen, the complaint clearly describes
19 television programs intermixed with advertisements,
20 taking fingerprints of the television programs, matching
21 up main and reference fingerprints to select the
22 particular points in the video. So it's clear, what
23 we're accusing is our functionality of SPARK is named,
24 and what we're accusing is that functionality that
25 inserts these advertisements or special content.

1 Mr. Huget read already claim -- paragraph 19
2 of the complaint, which I think sets it up very nicely.
3 What the complaint does is as we are just beginning to
4 get into the allegations we say, Upon information and
5 belief, the infringing product is capable of performing
6 a variety of functions, including content
7 fingerprinting, to analyze and take action, such as
8 enabling targeted advertisements, based on the content
9 displayed to the viewer. At the core of the infringing
10 product is an automatic content recognition platform.
11 So when Sorenson says in its briefs that they don't know
12 whether perhaps it's the Video on Demand or some other
13 product that's being accused, I think this paragraph
14 makes it quite clear.

15 And unless there are any questions, I'll
16 take my seat.

17 THE COURT: No. Thank you.

18 Mr. Huget?

19 MR. HUGET: Yes, briefly, Your Honor. Thank
20 you, Your Honor.

21 This shouldn't be that difficult, Your
22 Honor, I mean, for example, page 32 -- sorry, I don't
23 have a PowerPoint or anything -- but page 32, how SPARK
24 Analytics Suite works. Take the patent, take the
25 claims, give me a complaint that says you now have all

1 this, tell me what elements of the patent claims read on
2 this. It shouldn't be that difficult. We don't have
3 that.

4 Counsel admitted that they picked and choose
5 from various of these different suites we have. And to
6 say it's all one product, I think is sort of like
7 saying -- we put this in our brief, it's sort of like
8 saying you have Microsoft Office, that's one product.
9 It's not. You have Word, you have Excel, you have
10 PowerPoint. It's their -- do all of them accuse? We're
11 not saying that they have to pick one. We're just
12 saying for each one that you pick, tell us where it is,
13 tell us how it infringes. You have the patent claims,
14 you have this information.

15 THE COURT: What additional public
16 information would be available that would allow them to
17 plead with more detail?

18 MR. HUGET: This is a fair amount of
19 information. I don't know if there's much more than
20 this that's publicly available, but it seems to me, and
21 they've relied on it here, it seems to me that they've
22 got plenty of information here that they could go
23 through, and between this and other presentations they've
24 apparently gathered that we have -- and by the way, this
25 wasn't in front of the court before, this --

1 THE COURT: How would the case be advanced
2 if they were to go back, which you've asked, and amend
3 their complaint to include what you already know?

4 MR. HUGET: Because I don't know if this
5 suite is being accused of infringement. Is it? How is
6 it? Then I know what I have to produce, then I know
7 what I have to focus on in discovery, then I know what
8 my initial disclosures, the scope of my initial
9 disclosures have to be.

10 THE COURT: But under our patent rules you
11 will know that almost immediately.

12 MR. HUGET: That is if they -- they have
13 already filed their accused instrumentalities pleading,
14 and it does nothing more than what their claim chart
15 does now, it doesn't give me that focus, it doesn't
16 identify infringing products. I don't have much more
17 information because they went ahead and filed that. As
18 the court will recall, we were in front of you by phone
19 last November, and we asked that they be stayed, and
20 this argument came up, and we -- the point we had was
21 they've filed the accused instrumentalities, but it
22 doesn't tell us anything more than this claim chart.

23 THE COURT: Isn't your proper relief to tell
24 them that they need to amend and provide more detail in
25 their chart, in their accused infringement chart?

1 MR. HUGET: We would be satisfied with that
2 result, Your Honor. Most of the cases we have cited to
3 you, at least the cases that are in the first go-round,
4 are cases in which the court has granted leave.

5 THE COURT: Let me ask Mr. Yovits, is there
6 a reason why you failed to provide more information in
7 your -- when you provided the initial disclosure that
8 sets forth what your infringement claims were beyond
9 what's in the complaint?

10 MR. YOVITS: No, Your Honor. We simply felt
11 that the complaint set forth very clearly what we were
12 accusing and how the SPARK product was accused and we
13 simply renamed the SPARK product. We are certainly
14 happy to include much more information in the accused
15 instrumentalities disclosure if that solves the problem.

16 THE COURT: Does that solve the problem?

17 MR. HUGET: Well, if they can do it in the
18 accused instrumentalities, they can do it in the
19 complaint.

20 THE COURT: Why go through that step?

21 MR. HUGET: Well, because I don't know
22 how -- because at least if there's -- am I going to
23 fight over the amended complaint if it's not sufficient
24 or the accused instrumentalities? I guess that's why we
25 have the problem is the clock starts ticking on what I

1 have to do, unless I come to you and say, wait, I can't
2 produce this, but the clock's ticking, can you hear me
3 in time before I have to produce this? If I have a
4 complaint, the starting point of it is a sufficiently
5 detailed complaint, then we don't have those issues, we
6 don't have scrambling in discovery, because now I have
7 to produce additional disclosures and I have a ticking
8 clock. And I appreciate the court heard us quickly last
9 time, but you may be in trial or something may happen
10 and you may not want to hear us. But if we have a
11 robust complaint, then they can just cut and paste from
12 their complaint into their accused instrumentalities and
13 we're off and running.

14 THE COURT: How do you respond to that,
15 Mr. Yovits?

16 MR. YOVITS: Your Honor, I agree with you.
17 I don't think -- if indeed I'm agreeing with you, I'm
18 not sure, I don't think there is any point in delaying
19 and belaboring the process any further. If we can
20 provide this level of detail in our initial disclosures,
21 in our accused instrumentality disclosures, that seems
22 to be the way to get this case on track.

23 THE COURT: I'm still -- your initial
24 argument was you didn't know which of the four products
25 were accused.

1 MR. HUGET: I still don't.

2 THE COURT: Well, now you understand, and I
3 think it's set forth in the complaint, that they're
4 accusing aspects of every one of the four -- one of
5 their products, suites that are set forth in the SPARK
6 products, you now know that.

7 MR. HUGET: But what it doesn't do for me is
8 tell me with this product where is the proof -- what
9 claims of the -- they cited read on the SPARK Analytics
10 Suite works, for example, why can't they give me a claim
11 chart that says -- that points that out. That's their
12 burden.

13 THE COURT: That's what the initial
14 disclosure that they're required to do. If that initial
15 disclosure is not adequate, it seems to me the way to
16 advance this case is to require that they modify it and
17 amend their initial disclosure. When you get it and you
18 believe it doesn't give you adequate notice, you can
19 always come back to the court. If they've provided you
20 everything that is publically available at that point,
21 then I think discovery has to pursue in terms of your
22 responding to their -- to the next step that's required
23 for Sorenson. As a practical matter, what's wrong with
24 that approach?

25 MR. HUGET: The practical matter is that

1 it's a defective complaint. It's still -- they're
2 picking and choosing out of four different suites and
3 saying it's all in there, trust us, the claims read on
4 this, that and that. I don't have that level -- there's
5 nothing that ties the product to the product -- to the
6 claims.

7 THE COURT: Let me ask Mr. Yovits, in your
8 initial disclosure will that information be included?

9 MR. YOVITS: We certainly are happy to
10 include that information, Your Honor, to advance the
11 ball.

12 MR. HUGET: They haven't done it so far, and
13 that's the problem. I believe, and the case law
14 supports it, that that should be in the complaint.

15 THE COURT: Well, in terms of reading the
16 case law, I'm not satisfied that you're correct about
17 that because we're still at this, I suspect, exploratory
18 stage as to what *Iqbal* and *Twombly* are going to require
19 in a patent case once we got rid of the notion that you
20 could plead Form 18. And I've read a number of cases,
21 and a number of them say it's adequate if you plead what
22 the patent is, you plead the claims that you believe are
23 infringed, and you plead the product and identify how
24 you believe the product infringes those claims. I think
25 that's all pled here.

1 MR. HUGET: Well, I think the cases go
2 slightly a step farther, and they say you have to relate
3 the factual assertions to the asserted claims. And I
4 think that's what we're lacking here. These factual
5 assertions, when I looked at this chart they put up,
6 there's no attempt to relate that to the asserted
7 claims, none. That's our problem. If they could do
8 that and put that in a complaint in 2 weeks, 21 days, I
9 don't intend to come back here on a -- again, if they do
10 that, believe me, we'll be off and running then. We'll
11 file an answer and we'll be off and running. At least
12 I'll know what's in the complaint.

13 THE COURT: Mr. Yovits, do you want to
14 respond to that?

15 MR. YOVITS: Yes, Your Honor. The complaint
16 is not defective. What we've done is we've identified
17 the various aspects of the suites that go into the
18 product that's infringing, we've identified the way in
19 which -- or the functionality of the product that we are
20 accusing. There just doesn't seem to be a reason. And
21 because I am certainly willing and committing at this
22 time to provide an extra detailed initial disclosure, I
23 think there doesn't seem to be any reason not to pursue
24 it that way.

25 THE COURT: How soon could you do that?

1 MR. YOVITS: 14 days.

2 THE COURT: Anything further, Mr. Huget?

3 MR. HUGET: No, Your Honor. Well, I guess
4 my question is where do we go from there, the
5 scheduling, I mean how would the court like to proceed?
6 If we don't think that's sufficient, what would the
7 court prefer we do? If we still have the same problems
8 with that document that we have today, is there a
9 preferred -- I don't want to guess as to what the court
10 would like us to do, but I would like to proceed in a
11 manner that's consistent with the court's preferences.

12 THE COURT: Well, I guess it depends on what
13 your objections are.

14 MR. YOVITS: Your Honor, if I may, I think
15 the proper procedure would be if they're not satisfied
16 with this to let us know, and I commit to working in
17 good faith to get them whatever information they believe
18 they need. And I think it's very unlikely that we would
19 have to come back to the court.

20 THE COURT: I'm not going to rule from the
21 bench. I will issue a written ruling and it will come
22 out soon, and I will address the issues that you've
23 raised. I think that it's appropriate for our district
24 and our circuit to have an answer to the questions that
25 you've appropriately raised, and so I'm going to issue a

1 written ruling on this. But I'm inclined to believe
2 under our fast track discovery program that we follow in
3 this district you can get a remedy very quickly.

4 MR. HUGET: I appreciate that. I trust the
5 court on that point. My concern is -- I'm thinking
6 ahead to the disclosures and having to produce
7 different -- these programs are for different sets of
8 code, the Analytics Suite, Video Content, Video on
9 Demand, they're different sets of code, they're in
10 different stages of development because they're
11 constantly developing things. Do they connect together?
12 But they're different buckets. Do I have to produce all
13 four buckets? Do I produce one bucket? That's my
14 concern because that's going to be the burden. Do I
15 have to start producing source code and things like
16 that? I would really like to know because when my
17 client says, why do we have to produce Video on Demand,
18 where does it say that code? Where is there anything in
19 the complaint that accuses our Video on Demand product?
20 That's in here. That's the challenge I'm trying to
21 address, Your Honor.

22 MR. YOVITS: Your Honor, we're not accusing
23 Video on Demand. We won't ask for discovery on it. And
24 I would suggest that if there are any other areas that
25 are unclear like that, we'll just talk, we'll make it

1 clear, and then if it's still not satisfactory, maybe
2 then we come back to the court. But I do not believe --

3 THE COURT: I think that's what the rules
4 contemplate. When you get their additional disclosure,
5 if you've got questions about which parts of your suite
6 are under challenge, write a letter, make a record of
7 it. If they're not responsive, I'll help you.

8 MR. HUGET: I appreciate that. That's the
9 first we've heard that in this case while this motion
10 has been pending, they've never said that before today.
11 They've said, well, it's all under the number of
12 SPARK --

13 THE COURT: I suspect if they amended their
14 complaint there would still be questions.

15 MR. HUGET: If the court gave them some
16 guidance, they've had to do more, and if they're willing
17 to do a revised accused instrumentalities, then I think
18 that there is -- some of that could be in the complaint.

19 THE COURT: You should anticipate and start
20 working on your revised accused instrumentalities
21 because you're going to have to provide that. It's
22 going to be like 14 days, so don't delay. And if when
23 you get it it's not adequate, raise it, and we'll deal
24 with it immediately, but I think we need to move forward
25 with this case.

1 MR. HUGET: Thank you.

2 THE COURT: And I'll explain this more fully
3 in my written opinion, but I believe that the complaint
4 in this case gives adequate notice to satisfy the rules
5 under *Iqbal* and *Twombly*. Obviously, there's going to be
6 more discovery, there's going to be more detail that
7 will be produced in this case. But delaying another
8 period of time to amend the complaint and then dealing
9 with the challenge at that time I think is just delaying
10 the resolution of this issue. So we'll move forward in
11 that fashion.

12 Anything further before we recess?

13 MR. HUGET: No, Your Honor. Thank you.

14 MR. YOVITS: No. Thank you.

15 THE COURT: Thank you.

16 (Whereupon, the matter was concluded.)

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C E R T I F I C A T E

State of Utah

County of Salt Lake

I, Karen Murakami, a Certified Shorthand Reporter for the State of Utah, do hereby certify that the foregoing transcript of proceedings was taken before me at the time and place set forth herein and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

IN WITNESS WHEREOF, I have hereunto set my hand this 1st day of June, 2017.

Karen Murakami

Karen Murakami, CSR, RPR